APPENDIX A

STATE OF NEBRASKA, APPELLEE, V. OSWALD P. GONZALEZ, APPELLANT.

Filed May 28, 1982. No. 44356.
— N. W. 2d —

Search and Seizure: Constitutional Law. The capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Daniel K. Powers, for appellant.

Paul L. Douglas, Attorney General, Terry R. Schaaf and Bernard L. Packett, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, J.J.

WHITE, J.

This is a companion case to *State v. Longa, ante* p. 356, — N. W. 2d — (1982). The defendant-appellant, Oswald P. Gonzalez, was arrested on September 3, 1980, along with his codefendant, Cristobal Longa, and was charged with a violation of Neb. Rev. Stat. § 28-416 (1) (a) (Reissue 1979), possession of a controlled substance with intent to deliver. Motions to suppress illegally obtained evidence were overruled and both defendants were tried jointly in the Douglas County District Court before a jury. Both defendants were convicted and Gonzalez was sentenced to from 1 year to 3 years in the Nebraska Penal and Correctional Complex. We affirm.

The evidence shows that the Omaha Police Department received information from a confidential source regarding a purchase and sale of cocaine. The informant told members of the Omaha Police Department that the parties inside the house located at 4057 Frederick Street, Omaha, Nebraska, were going to purchase a large amount of cocaine and that the party leaving that residence would have with him a large quantity of money to purchase the cocaine. The officers were told that the party would leave the residence on Frederick Street and drive to an unknown location to pick up multiple ounces of cocaine. The informant also told police that he had seen cocaine packaged for street sale in a residence located at 422 North 34th Street, Omaha, Nebraska, and at 4057 Frederick Street as well. The informant provided Omaha police officers with a sample which was tested and verified as cocaine. The officers testified that they considered their informant reliable since he provided officers with cocaine which had been clinically tested as such and had provided information on prior occasions which resulted in convictions. Further, the informant's information was verified by surveillance.

After being informed about the possible drug purchase, police officers placed the residence at 4057 Frederick Street and the residence at 422 North 34th Street under surveillance in anticipation of following individuals going to and coming from those locations, to determine the source of the suspected narcotics. The informant told police officers that on the evening of September 3, 1980, a person by the name of Ned Reynolds would be leaving his residence at 4057 Frederick Street to make a purchase of cocaine. Later another source informed the police that Reynolds would not

be making the purchase; however, somebody would leave the Frederick Street residence to make the buy.

On the basis of this information, the police obtained search warrants for both residences during the afternoon of September 3, 1980. Surveillance was established at the Frederick Street residence in late afternoon of September 3, 1980, by members of the vice and narcotics unit.

At approximately 6 or 6:30 p.m., on September 3, 1980, police officers observed a person later identified as James Sorensen leave the Frederick Street residence. Officers followed Sorensen to a residence located at 35th and Jackson Streets. Sorensen entered 3524 Jackson Street and stayed approximately 15 to 30 minutes. Sorensen was seen leaving 3524 Jackson Street carrying what appeared to be two soft black packets. Police officers followed Sorensen to 422 North 34th Street. Shortly thereafter, Sorensen was followed to 4057 Frederick Street.

Police officers were unaware of any suspicious activity or any involvement of the Jackson Street address prior to Sorensen's arrival. Officer Katherine McKillip of the Omaha Police Department maintained surveillance of the 3524 Jackson Street residence after Sorensen's departure. Approximately 10 to 15 minutes after Sorensen had left, Officer McKillip noticed four people leave the Jackson Street residence. The four talked in the yard for several moments and then two "dark complected" men walked across the yard and got into a black Cadillac containing California license plates. The 1977 Cadillac had been parked in the vicinity of the Jackson Street address at the time Sorensen was followed there. One of the

men, later identified as defendant Gonzalez, was carrying what appeared to be a black shaving kit under his shirt. He placed the article in the front seat of the car, and the other man, identified as defendant Longa, removed from the car what appeared to be a pillowcase and then dumped its contents into the trunk. The two men entered the Cadillac and drove off. Officer McKillip was picked up by Sgt. Jack O'Donnell of the Omaha vice and narcotics unit. McKillip told O'Donnell what she had seen and the two followed the Cadillac to a convenience store located at 33rd and Cass Streets.

In the parking lot of the convenience store, Sergeant O'Donnell and Officer McKillip left their unmarked police car and approached the Cadillac. Sergeant O'Donnell testified that he identified himself as a police officer and asked the driver of the Cadillac whether they had any drugs or money in the car. The driver, Gonzalez, replied that they had money in the car. At this, Sergeant O'Donnell asked if it was more than $1,000 and Gonzalez replied yes. O'Donnell testified that at that point the two men were placed under arrest and transferred to central police headquarters. The Cadillac was towed to a police holding lot and impounded.

Shortly after defendants Gonzalez and Longa's arrest, the police served search warrants at 422 North 34th Street and 4057 Frederick Street. These searches resulted in the seizure of substances which were later clinically identified as cocaine. Police officers arrested six persons at the Frederick Street residence. Based upon the evidence seized and the arrests made at these addresses, plus activities of those persons under surveillance, warrants were issued for the search of the 1977 Cadillac as well as the residence at

3524 Jackson Street. The Jackson Street address was searched at approximately 10:30 p.m. on September 3, 1980, and resulted in the seizure of substances later clinically identified to be cocaine, a large amount of money, and the arrest of one Scott Rosencrantz. The Cadillac, which was registered to Gonzalez, was searched at about 10:45 p.m., September 3, 1980. The search of the Cadillac resulted in the seizure of a black bank bag containing $8,708 and numerous items of identification of one Oswald P. Gonzalez. A search of the automobile trunk revealed numerous items of clothing and the normal tire-changing equipment. No controlled substances were found in the Cadillac. Based on the absence of controlled substances in the Cadillac, as well as the absence of any "toilet articles," the interest of Lt. Robert Olson was aroused in discovering where Gonzalez and Longa were staying while they were in Omaha. By questioning Scott Rosencrantz, it was discovered that Gonzalez and Longa had been staying at the New Tower Motel. A search warrant was prepared for that location. An attempt to locate the defendant's room at the New Tower proved unsuccessful and gave rise to an investigation of local motels in the area in an attempt to find where defendants Gonzalez and Longa were staying. Shortly after 12 a.m., September 4, 1980, Officer Thomas Gorgen found a room registration in the name of the defendants at the Thrifty Scot Motel. Also listed on the room sign-in sheet was the 1977 Cadillac with the California license number. The previous affidavit for the search of the New Tower Motel was altered at the direction of Lieutenant Olson by inserting Thrifty Scot wherever New Tower appeared. That affidavit, in addition to the affidavits set forth for the previous warrants, were at-

tached to the request for a search warrant of the motel room. On the basis of all that had transpired on September 3, 1980, a warrant was issued for the search of room 407 at the Thrifty Scot Motel. The search was conducted at approximately 1:30 or 2 a.m. on September 4, 1980, and resulted in the seizure of certain notebooks and papers, $3,800 in cash, a suitcase containing cocaine, a scale, and other assorted items. Police also found a package of cocaine rolled up in a towel. All the substances seized from the motel room, 4057 Frederick Street, 422 North 34th Street, and 3524 Jackson Street clinically tested as cocaine. These findings resulted in the filing of an information against defendant Gonzalez and his companion Longa.

Gonzalez assigns the following errors: (1) The District Court erred in overruling his motion to suppress illegally obtained evidence; (2) The District Court erred in admitting into evidence statements obtained when the defendant was in custody without a showing that he had been advised of his right to remain silent; (3) The District Court erred in refusing to grant the defendant a hearing on the veracity of the supporting affidavit of the search warrant used to search room 407 of the Thrifty Scot Motel; and (4) The District Court erred in commenting on the evidence incorrectly during final argument in a way which was prejudicial to the defendant.

The issue of when the arrest occurred was fully discussed in *State v. Longa, supra,* and for the same reasons set forth therein we conclude here as well that the activities of the officers prior to the actual arrest of Gonzalez and Longa were based upon a suspicion of criminal activity found within the fourth amendment guidelines and are permissible under Neb. Rev. Stat. § 29-829 (Reissue 1979).

Gonzalez moved to suppress all evidence obtained as a result of his unlawful arrest, all items obtained "as a result of the search of the Thrifty Scott Motel, Room #407," all items obtained "as a result of a search of his 1977 Cadillac," and any items seized or "derived from a search of 3524 Jackson." Again, with respect to Gonzalez' assignments (1) and (2, we reiterate the conclusion reached in *State v. Longa, supra,* that the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room was not discovered as the result of an "exploitation" of the arrest claimed to have been illegal, but resulted instead from independent sources. The evidence reveals that the officers were informed by the defendant that he had more than $1,000 in cash in the automobile prior to his arrest. Defendant's second assignment of error is without merit.

Turning to defendant's first and third assignments of error challenging the search of the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel room, we conclude that Gonzalez did not have standing to attack the search of the Jackson Street duplex. See, *State v. Vicars,* 207 Neb. 325, 299 N. W. 2d 421 (1980); *State v. Ohler,* 208 Neb. 742, 305 N. W. 2d 637 (1981); *State v. Kemper,* 209 Neb. 376, 307 N. W. 2d 820 (1981); *Katz v. United States,* 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois,* 439 U. S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Rawlings v. Kentucky,* 448 U. S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Those cases reflect the holdings of this court and the U. S. Supreme Court that the capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the per-

son who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place.

There was no showing whether the defendant was, in fact, ever residing at the Jackson Street address, had a key for entry to that address, rented or owned the property, exercised any type of control over the property, or kept any clothing or personal belongings at the property. On this basis we conclude that Gonzalez did not have a legitimate expectation of privacy in the Jackson Street residence.

The discussion of probable cause for the issuance of the search warrants for the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel were fully discussed in *State v. Longa, supra.* On the basis of the conclusions reached therein, defendant's first and third assignments of error are without merit.

In his last assignment of error, defendant contends that the District Court erred in commenting on the evidence incorrectly during final arguments in a way which was prejudicial to the defendant. The court stated: "While you are on that subject and while you are stopped here in your argument, I will tell you, Mr. Riley, that Officer O'Donnell did testify that he searched 3524 Jackson Street and they recovered cocaine, so it is in evidence." Defendant contends that this statement was not a correct statement of the evidence because Officer O'Donnell had testified: "Q. Were controlled substances or suspected controlled substances recovered at that location? A. Yes. Q. And the nature of which was? A. Cocaine." Defendant's contention that the court's statement and Officer O'Donnell's actual testimony were factually incorrect is

without merit. There is no prejudice to the defendant by these statements.

The judgment of the District Court is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, *v.*
CRISTOBAL M. LONGA, APPELLANT.

Filed April 23, 1982. No. 44343.
— N. W. 2d —

1. *Constitutional Law: Arrests.* A person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

2. *Constitutional Law: Search and Seizure.* In appropriate circumstances the fourth amendment allows a properly limited search or seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime.

3. *Investigative Stops.* An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity.

4. *Arrests.* The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary, interference by law officers.

5. *Arrests*: *Evidence.* The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible per se.

6. *Evidence*: *Search and Seizure.* The "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source.

7. *Search Warrants*: *Probable Cause.* In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.

8. ———: ———. Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit for a search warrant, and is not limited to the firsthand knowledge of the officer who executed the affidavit.

9. *Search Warrants*: *Affidavits.* An affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded.

10. *Convictions*: *Appeal and Error.* This court will not reverse a criminal conviction in the absence of prejudice to the defendant.

Appeal from the District Court for Douglas County: Paul J. Hickman, Judge. Affirmed.

I. Mark Bledstein and Leslie Ellen Shear of Bledstein & Lauber, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendant, Cristobal M. Longa, was charged by information with knowingly or intentionally possessing cocaine with the intent to distribute, deliver, or dispense said controlled substance. Defendant's motions to suppress certain evidence seized following his arrest were overruled after a hearing on the motions. According to a jury verdict filed on April 17, 1981, the defendant was found guilty by the District Court for Douglas County and was sentenced to a term of not less than 3 nor more than 5 years in the Nebraska Penal and Correctional Complex. He has appealed from that conviction and sentence, contending specifically that certain evidence seized was inadmissible as the fruits of an arrest made without probable cause; that the warrants for the seizure of evidence were not based on probable cause; and that the trial court erred in limiting testimony at the suppression hearing to evidence appearing on the face of the warrants. We affirm.

At some time prior to September 3, 1980, members of the Omaha Police Department received information from a confidential source concerning certain drug-related activities in the city of Omaha. This informant told police that he had seen cocaine packaged for street sale in a residence house located at 422 North 34th Street in Omaha. Furthermore, he stated that he also had been inside the residence of one Ned Reynolds at 4057 Frederick Street

and had observed cocaine packaged for street sale there as well. Finally, the informant told police that Ned Reynolds was involved in the sale of narcotics, and that on the evening of September 3 or 4, 1980, Mr. Reynolds would leave his residence at 4057 Frederick Street to make a purchase of cocaine. Another source informed the police at a later point that while someone would be leaving the Frederick Street residence to purchase cocaine, that person would not be Mr. Reynolds.

On the basis of this information, the police obtained search warrants for both residences during the afternoon of September 3, 1980. Surveillance was also established at the Frederick Street residence in the late afternoon of September 3, 1980, by members of the vice and narcotics unit.

At approximately 6:30 p.m., on September 3, 1980, officers observed a person, who was later identified as James Sorensen, leave the Frederick Street residence and drive away in a yellow Mustang. This car was followed to a duplex on Jackson Street where Sorensen was observed entering the residence at 3524 Jackson Street. Approximately 25 minutes later Sorensen was seen leaving the Jackson Street residence carrying a black soft object or objects, described by one officer as "packets of some sort." From here Sorensen was followed to the 422 North 34th Street address and eventually returned to the Frederick Street residence.

Prior to Sorensen's arrival at the Jackson Street address the police were completely unaware of any suspicious activity at this residence. Upon Sorensen's arrival at that address, one officer noted the presence of a 1977

Cadillac parked in the vicinity of the duplex. While Sorensen was inside the Jackson Street duplex, a second car approached the residence and an occupant thereof went inside the residence for a short time. This vehicle was followed as it left the residence and was eventually stopped. Its occupants, however, were not held for any reason connected with the present case.

Following Sorensen's departure from Jackson Street, Officer McKillip was left at the address to continue with the surveillance. At approximately 7:30 p.m., 10 to 15 minutes after Sorensen had left this officer noticed four people emerge from the residence, stand on the lawn and talk for a few minutes, and then walk off in separate directions. Two of these individuals, one of whom was identified as the appellant herein, walked toward the aforementioned Cadillac. The officer observed appellant remove what appeared to be a pillow case from the passenger side of the Cadillac and dump its contents into the trunk of the car. Appellant's companion, Oswald Gonzalez, was observed crossing the street carrying an object under his shirt. Upon reaching the car, Gonzales entered the driver's side and was seen removing what appeared to be a black shaving case from under his shirt and placing it on the front seat. The officer termed the companion's activities "strange" and stated that it made her pay "particular attention to what they [Longa and his companion] were doing." Appellant then got into the passenger seat of the Cadillac and Gonzales got behind the wheel and drove away.

At this point the officer conducting the surveillance was picked up by a second officer, Sergeant O'Donnell, in

order to follow the Cadillac. Officer McKillip advised Sergeant O'Donnell that the occupants of the Cadillac had acted "strange" and that she felt the car should be stopped for further investigation. The Cadillac was followed until it stopped at a convenience store at the intersection of 33rd and Cass Streets. At this point the officers pulled up behind the Cadillac, approached the car, and identified themselves as police officers. While there is some dispute over whether appellant was in the car or standing outside of it at this point, such a conflict does not appear material or relevant to this case. Upon identifying himself as an officer, Sergeant O'Donnell asked the occupants of the Cadillac whether they possessed any drugs or money, to which appellant's companion responded that they did not have any drugs but did have over $1,000 in cash with them. At or near this time, third and fourth officers arrived. Longa and his companion, Gonzales, were handcuffed and placed in a squad car, and the Cadillac was impounded.

Shortly after Longa's arrest the police served the search warrants at 422 North 34th Street and 4057 Frederick Street. These searches resulted in the seizure of substances, suspected to be cocaine, from each address and the detention of six or seven persons at the Frederick Street residence. Based upon these seizures and arrests, plus activities of those persons under surveillance, warrants were issued for the search of the 1977 Cadillac as well as the residence at 3524 Jackson Street. The search of the Jackson Street residence took place at about 10:30 p.m. on September 3, 1980, and resulted in the seizure of substances suspected to be cocaine, a large amount of money, and the arrest of one Scott Rosenkrantz. The

Cadillac, which was registered in Gonzalez' name, was searched at about 10:45 p.m. that same evening, and resulted in the seizure of a black bank bag containing over $8,000 and numerous items of identification of one Oswald Gonzalez. A search of the car's trunk revealed numerous items of clothing scattered about the trunk on hangers. No controlled substances were found in the Cadillac.

The absence of any controlled substances in the Cadillac, as well as the absence of any "toilet articles," aroused the interest of the police in discovering where Longa was staying while in Omaha. By questioning Mr. Rosenkrantz it was discovered that Longa may have been staying at the New Tower Motel, and preparation for a warrant application for that location was commenced. An attempt to locate appellant's room at the New Tower proved unsuccessful, and gave rise to an investigation of local motels in an attempt to find the one at which Longa was staying. This investigation resulted in the discovery that appellant was staying at the Thrifty Scot Motel, and consequently the affidavit for the warrant was altered, at the direction of one of the investigating officers, by the insertion of "Thrifty Scot" wherever "New Tower" appeared. It should be noted that affidavits setting forth all the facts concerning the activities of September 3, 1980, as set out above, were also attached to the request for the warrant to search the motel room.

On the strength of these affidavits, a warrant was issued to search room 407 at the Thrifty Scot Motel. The search resulted in the seizure of certain notebooks and papers; $3,800 in cash; a suitcase containing a suspected controlled substance, a scale, and other assorted items;

and certain other amounts of a suspected controlled substance from various other areas of the room. The substances seized from the motel room were later analyzed by a chemist who confirmed that the substances were cocaine of varying quality. These findings resulted in the filing of the aforementioned information against appellant and his subsequent conviction.

Longa's first assignment of error concerns the admissibility of the items seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room. He contends that the officers did not have probable cause to stop the Cadillac at 33rd and Cass Streets, and that, therefore, all evidence seized thereafter is inadmissible as the fruits of an illegal arrest.

The resolution of this issue requires that we first address the question as to when the arrest actually occurred. As recently noted by the U. S. Supreme Court: "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. . . . We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact

between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *United States v. Mendenhall*, 446 U. S. 544, 553-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

On at least one occasion in the past we have determined that one who is stopped by an officer during a rainstorm and asked to come down to the sheriff's office to talk was not under arrest until he reached the sheriff's office and was observed trying to conceal a knife as he got out of the car. This was in spite of the fact that another officer accompanied the person as a passenger in the car as the person drove his automobile to the sheriff's office. *State v. Irwin*, 191 Neb. 169, 214 N. W. 2d 595 (1974).

In light of *Irwin* and the standards for arrest articulated by the U. S. Supreme Court, we cannot conclude that appellant was arrested at any point prior to the time he was handcuffed and placed in the police squad car. The actions of Officers McKillip and O'Donnell in stopping their car behind the Cadillac, approaching appellant and his companion with guns holstered and identifying themselves as officers, and then inquiring whether appellant or his companion possessed either a controlled substance or a large amount of cash were not tantamount to an arrest and therefore did not mandate that the officers possess "probable cause" at this time.

Neb. Rev. Stat. § 29-829 (Reissue 1979) permits officers to make stops short of an arrest in order to determine the name and address of the person stopped, and receive an explanation of that person's actions. While such "investigative stops" are governed by the fourth amendment

as well, it is clear that "in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *United States v. Brignoni-Ponce*, 422 U. S. 873, 881, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

The rationale behind requiring something less than probable cause for such stops is readily applicable to the present case. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* [*Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U. S. 143, 145-46, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). See, *State v. Jefferson*, 196 Neb. 340, 242 N. W. 2d 881 (1976); *State v. Micek*, 193 Neb. 379, 227 N. W. 2d 409 (1975).

This lesser standard for investigative stops was recently articulated by this court in *State v. Ebberson*, 209 Neb. 41, 305 N. W. 2d 904 (1981), and reiterated in *State v. Nowicki*, 209 Neb. 640, 309 N. W. 2d 89 (1981). Therein, relying on *United States v. Cortez*, 449 U. S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), we determined that, "'an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is

about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances—the whole picture—must be taken into account.

"'Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.* See, *Brown v. Texas*, 443 U. S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U. S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).'" (Emphasis in original.) 209 Neb. at 645, 309 N. W. 2d at 92-93.

It must be noted that this lesser standard is applicable only to "reasonable" seizures that fall short of an arrest. "The reasonableness of seizures that are less intrusive than a traditional arrest [citations omitted] depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Brown v. Texas*, 443 U. S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

It is readily apparent when one applies the facts of the present case to these standards that the officers in question took reasonable action on the basis of particularized and objective facts. A view of the totality of the circumstances reveals that Longa was present at a house prior to and during a visit to said house by one James Sorensen. The police had observed Sorensen previously

leaving a house from which they suspected someone was to leave to make a drug purchase on September 3, 1980. Police also observed this same James Sorensen leave the house where appellant was located, carrying two soft packets of something. Furthermore, appellant and a companion were seen leaving this house 10 to 15 minutes after Sorensen, and the companion was carrying an object under his shirt in a "strange" manner. This activity caused one officer to conclude that appellant and his companion should be investigated further. Finally, the police had been made aware of the fact that the drug supplied for the suspected sale was from out of state and possibly was connected to Las Vegas, Nevada. This knowledge served to increase suspicion when appellant and his companion entered a car bearing California license plates.

On the basis of these facts we conclude that the activities of the officers prior to the actual arrest of appellant were based upon a suspicion of criminal activity falling within the fourth amendment guidelines set forth above. Therefore, such action was permissible under § 29-829.

We move next to Longa's contention that the arrests of himself and Gonzalez were illegal and all evidence seized was the "fruit of the poisonous tree." Although we believe that the arrests in this instance may very well have been justified under the ruling in *United States v. Vasquez*, 638 F. 2d 507 (2nd Cir. 1980), it is not necessary for us to make that determination. The only evidence which the record discloses that the officers obtained from Longa or Gonzalez was the fact that they possessed no drugs, but did have over $1,000 in cash. This information was furnished by Gonzalez *prior* to the arrest as a result of a legitimate investigatory stop.

As we recently noted in *State v. Smith*, 207 Neb. 263, 268-69, 298 N. W. 2d 162, 166 (1980): "In *Brown v. Illinois*, 422 U. S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), the U. S. Supreme Court made it clear that the mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible 'per se.' Further, in the case of *Costello v. United States*, 365 U. S. 265, 280, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), the U. S. Supreme Court made it clear that, '[T]he "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an "independent source."'" Was the evidence being challenged by appellant, to wit, the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room, "fruit of the poisonous tree," or was it obtained from an untainted "independent source"? The test to be applied is whether "'the evidence to which instant objection is made has been come at by exploitation of that illegality [the illegal arrest] or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun v. United States*, 371 U. S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Upon applying this test to the facts of the present case, it is our conclusion that the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room was not discovered as a result of an "exploitation" of the arrest claimed to have been illegal, but resulted instead from independent sources. Appellant's first assignment of error is without merit.

Turning to appellant's second assignment of error challenging the existence of probable cause for the issu-

ance of the earch warrants for the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel room, we have serious doubts as to his standing to challenge the search of either the Cadillac or the Jackson Street duplex. However, because the three searches were so intertwined from a factual standpoint, we will ignore the standing issue for the purposes of this opinion.

We note that "[t]he rule is well established that, in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *State v. Bazis*, 190 Neb. 586, 210 N. W. 2d 919 (1973). It is also well established that affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion; and that where the circumstances are detailed, where reasons for crediting the source of information is given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner. *State v. Payne*, 201 Neb. 665, 271 N. W. 2d 350 (1978)." *State v. Stickelman*, 207 Neb. 429, 433, 299 N. W. 2d 520, 523 (1980). Furthermore, we have held that "probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit." *Id.* at 433, 299 N. W. 2d at 524.

The affidavits for the warrants to search the Cadillac and the Jackson Street residence were also attached to the application for the warrant for the Thrifty Scot Motel

room. Therefore, the information provided to the magistrate in support of the issuance of warrants for each location included the fact that an informant had provided information regarding a drug purchase that was to originate at 4057 Frederick Street on September 3 or 4, 1980; that officers had observed James Sorensen drive from the Frederick Street address to a duplex at 3524 Jackson Street and leave that address carrying a packet containing a soft substance; that appellant and a companion were observed leaving the Jackson Street address shortly after Sorensen had left, and the companion was carrying an object under his shirt; that appellant and his companion had admitted prior to their arrest that they were carrying over $1,000 in cash; and that a search of the Frederick Street residence following Sorensen's return to that address resulted in the seizure of multiple ounces of a suspected controlled substance. An additional affidavit attached to this application contained information regarding the basis of the informant's information and his credibility. On the basis of this information, we conclude that probable cause did indeed exist for the issuance of the warrants for the Jackson Street duplex and for the Cadillac.

The existence of probable cause for the issuance of the warrant to search the room at the Thrifty Scot Motel additionally relates to the so-called "defective" affidavit. Although somewhat redundant, we believe that it is necessary to discuss this affidavit in more detail. The affidavit was signed by Officer Jack Caniglia. As originally drawn, it states: "When Scott ROSENKRANTZ was questioned by Sgt. O'DONNELL concerning the two Cubans GONZALEZ and LONGA, Scott ROSENKRANTZ stated that while these two persons were in town they were staying

at the NEW TOWER MOTEL, 7101 Grover St. . . ." However, Lt. Olson, who was supervising the preparation of the affidavit, testified that he sent Sgt. O'Donnell and Officers Wills and Gorgen out to check things out with the desk clerk. Sometime thereafter, Sgt. O'Donnell reported back the fact that the two suspects had checked out of the New Tower Motel that morning. Lt. Olson then ordered his officers to check other motels in the area to see if they could be located. Sometime around midnight, Lt. Olson received a call from Officer Gorgen that he had "located them at The Thrifty Scot." Olsen then instructed the typist to go through the affidavit and wherever the affidavit said "New Tower" to insert "Thrifty Scot." Also, he dictated an additional paragraph which read "Officer GROGEN [sic] checked the motel and found that a LONGA & GONZALEZ are registered there and there is a note in their box, Room 407."

We have noted in the past that "an affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded." *State v. Green*, 201 Neb. 828, 832, 272 N.W. 2d 764, 767 (1978). When this is done to the present affidavit, although all reference to the location of Longa and Gonzalez at the Thrifty Scot Motel as related by Rosenkrantz would be deleted, the affidavit still contains the statement that Officer GROGEN [sic] checked the motel [Thrifty Scot] and found that a LONGA & GONZALEZ are registered there. . . ." Considering that all the facts set forth above in relation to the Jackson Street and Cadillac warrants were also contained in affidavits attached to the application for the Thrifty Scot warrant, in spite of the mis-

statement of fact contained in the one affidavit, we conclude that the warrant was properly issued for a search of the Thrifty Scot Motel room. Appellant's second assignment of error is without merit.

This brings us to appellant's third and final assignment of error. That assignment is as follows: "The trial court erred in limiting testimony to information appearing on the face of the warrants, since all information known to the police was relevant to the constitutionality of Appellant's arrest." His proposition of law in support of this assignment reads: "The requirement that probable cause be challenged only from the face of the search warrant affidavit does not apply where the defendant seeks to suppress evidence as the fruit of an arrest made without probable cause." That Longa is truly concerned only with the warrantless arrest and not the search warrants is evident by reference to counsels' comments to the trial court at the suppression hearing. Gonzalez' attorney stated: "I believe that it is very relevant to this arrest, not to the affidavits, but to this arrest, whether the information received by the officer came from a reliable informant. We are ruling here on the warrant. The ruling has to be upon whether this Court feels that the officers acted within the law by relying upon the information given to them by this informant." Immediately thereafter, Longa's attorney said: "There is no affidavit or warrant for the arrest of these guys, Judge. . . . I agree that what Jack O'Donnell [the arresting officer] knew is certainly important. . . . [B]ut I think it was quite clear . . . that here is the man, Lieutenant Olson, that is feeding him a lot of the information, not personally gathering information, but he is kind of the axle in the thing giving out the information."

Additionally, in the argument portion of his brief, Longa states: "But there was also an issue as to the validity of the warrantless arrests of Longa and Gonzales [sic]. With respect to that issue, the defense was entitled to inquire fully into the state of mind of the officers."

Even assuming that the trial court was in error in limiting appellant's examination as to the reliability of the informant, Longa's attack in this regard goes only to the question of whether there was sufficient probable cause to arrest appellant and, consequently, whether evidence seized subsequent to the arrest was inadmissible as fruit of an illegal arrest. In light of our determination that the evidence seized was not connected with appellant's arrest, a challenge of probable cause for the arrest is immaterial and any error by the trial court in that area would be harmless error.

"It is a longstanding rule of this court that it will not reverse a criminal conviction in the absence of prejudice to the defendant." *State v. Brehmer, ante,* p. 29, 38, — N. W. 2d —, — (1982). Therefore, we may disregard the third assignment of error.

There is no prejudicial error in this record, and the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurs in the result.

APPENDIX B

AMENDMENTS TO THE UNITED STATES CONSTITUTION

(ARTICLE IV)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(ARTICLE V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ARTICLE XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in sup-

pressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES IN THE STATE OF NEBRASKA

29-829 A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb he may search such person for a dangerous weapon. . . .

APPENDIX C

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOC. 108 No. 336

THE STATE OF NEBRASKA,

Plaintiff,

vs.

OSWALD P. GONZALEZ,

Defendant.

MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF ILLEGAL ARREST

(Filed November 20, 1980)

COMES NOW the defendant, Oswald P. Gonzalez, by and thru his attorneys, Daniel K. Powers and Eduardo M. Guzman, and moves the Court to suppress and exclude from use against him any and all evidence obtained as a result of his arrest on September 3, 1980 at or near 33rd and Cass for the reason his arrest was made without a warrant and without probable cause and was in violation of and contrary to the rights guaranteed the defendant pursuant to Article I, Sections 3, 7 a d 12 of the Constitution of Nebraska and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, the defendant prays that the Court suppress and exclude from use against him any and all

evidence obtained as a result of his unlawful arrest and return all property seized as a result thereof.

OSWALD P. GONZALES

By: /s/ Daniel K. Powers
One of his Attorneys
733 Keeline Building
Omaha, Nebraska 68102

EDUARDO M. GUZMAN
One of his Attorneys
3660 Wilshire Boulevard
Suite 844
Los Angeles, California 90010

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOC. 108 NO. 336

THE STATE OF NEBRASKA,
Plaintiff,

vs.

OSWALD P. GONZALEZ,
Defendant.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

(Filed November 20, 1980)

COMES NOW the defendant, Oswald P. Gonzalez, and moves the Court to suppress and exclude from evidence any and all items obtained as a result of the search of the Thrifty Scott Motel, Room #407 for the following reasons:

1. The affidavits in support of the warrant recite information obtained in violation of his right to remain silent and be free from unreasonable searches and seizures.

2. The affidavit in support of the warrant is insufficient as a matter of law.

3. Issuing Judge incorrectly found probable cause for issuance of the warrant in the affidavits.

4. The affidavit did not contain facts sufficient as a matter of law to establish probable cause.

5. Statements in the affidavit relating the possibility the "two Cuban persons" may have "more cocaine" are mere conclusions based on suspicions with the facts supporting said conclusions left unstated.

6. There are no facts in any of the affidavits in support of the warrant which indicate unidentified informant #2 is reliable.

7. There are absolutely no facts in the affidavit which indicate the source or basis of informant #2's conclusion that the "two Cuban persons arrested were the main suppliers of the cocaine delivered at 4057 Frederick" or the speculations and conclusions in regard to the possibility of more cocaine.

8. The affidavit in support of the warrant incorporates the affidavit for the search of the defendant's automobile and information obtained therefrom are derived from the illegal arrest of the defendant and illegal search of defendant's automobile.

9. The affidavits in support of the warrant were drafted and executed in reckless disregard for the truth, the whole truth and nothing but the truth, and the allegations contained in the defendant's motion to suppress the items seized in his

automobile and 3524 Jackson are hereby adopted and incorporated by reference and furthermore the defendant shows the court:

A. The affidavit sworn to by Jack Caniglia states that Scott Rosencrantz told Jack O'Donnell that the defendants were staying at the Thirty Scott, but according to the deposition of Jack O'Donnell, Scott Rosencrantz told Jack O'Donnell that the defendants were staying at the New Tower and when Jack O'Donnell went to the New Tower and checked, the defendants were not staying there, and the location of the defendants room was established by a random checking of motels.

10. The search of the Thrifty Scott Motel Room #407 violated the rights guaranteed to the defendant by Article I, Sections 3, 7, and 12 of the Constitution of the State of Nebraska and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, the defendant prays the Court suppress any and all evidence obtained as a result of said search, return to the defendant all items seized pursuant to said warrant and grant the defendant a hearing on the veracity of the supporting affidavits.

OSWALD P. GONZALEZ, Defendant

By /s/ DANIEL K. POWERS
One of his Attorneys

733 Keeline Building
Omaha, Nebraska 68102

EDUARDO M. GUZMAN
One of his Attorneys

3660 Wilshire Boulevard
Suite 844
Los Angeles, California 90010

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

DOC. 108 NO. 336

THE STATE OF NEBRASKA,

Plaintiff,

vs.

OSWALD P. GONZALEZ,

Defendant.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

(Filed November 20, 1980).

COMES NOW the defendant, Oswald P. Gonzalez, and moves the Court to suppress and exclude from evidence any and all items obtained as a result of a search of his 1977 Cadillac for the following reasons:

1. The initial search was not incident to a lawful arrest.
2. The search was prior to the issuance of a search warrant for the automobile.
3. Information obtained from the warrantless search was used to obtain a warrant.
4. The affidavit in support of the warrant recites information obtained from the defendant in violation of his right to remain silent and his right to be free from unreasonable searches and seizures.
5. The affidavit in support of the warrant is insufficient as a matter of law.
6. Issuing Judge incorrectly found probable cause for issuance of the warrant in the affidavits.

7. The affidavit did not contain facts sufficient as a matter of law to establish probable cause.

8. Statements in the affidavit relating the possibility the "two Cuban persons" may have "more cocaine" are mere conclusions based on suspicions with the facts supporting said conclusions left unstated.

9. There are no facts in any of the affidavits in support of the warrant which indicate unidentified informant #2 is reliable.

10. There are absolutely no facts in the affidavit which indicate the source or basis of informant #2's conclusion that the "two Cuban persons arrested were the main suppliers of the cocaine delivered at 4057 Frederick" or the speculations and conclusions in regard to the possibility of more cocaine.

11. The warrant is a noxious variety of the long condemned general warrant in that it describes places owned by different and unknown persons and authorizes a search of more than one place owned and controlled by different persons, in gross violation of the Fourth and Fourteenth Amendments.

12. The affidavits recite conclusions and facts while not stating other facts known to the affiant at the time of the affidavit which taken together leaves no doubt that the affidavit was executed in reckless disregard of the truth. In particular:

    1. The police observed one James Sorenson leave 4057 Frederick believing he was going to make a cocaine delivery and/or purchase.

    2. The police followed Sorenson to 3524 Jackson.

    3. When Sorenson entered 3524 Jackson he was observed to be not carrying anything.

    4. While Sorenson was inside 3524 Jackson another person arrived carrying a magazine and

left. That person and his companion were followed, stopped and searched by the police and no evidence was obtained.

5. Sorenson left the Jackson Street address carrying an object which police at the time of the dafting of this affidavit, had seized and determined the item was probably a camera case.

6. The police at the time of the execution of this affidavit did not know whether the duplex at 3524 Jackson was occupied by multiple parties or how many separate rooms were contained therein.

7. After approximately 15 minutes four people left the Jackson Street address, one of whom was the defendant. The defendant was carrying a briefcase partially covered by his shirt. After the defendant reached his automobile, his co-defendant placed some objects in the trunk. No contraband or illegal activity was observed.

8. At the time Sorenson left the Frederick Street address, he was carrying a picnic basket which he did not carry into the Jackson Street address.

9. When Sorenson re-entered the Frederick Street address, he was observed to be carrying the picnic basket which was seized prior to the execution of this affidavit and which police found on the floor, opened and containing a gram scale with white residue.

In summary, the facts, if recited in full when compared with the facts and conclusion in the affidavit, show a reckless disregard for the truth, the whole truth and nothing but the truth.

13. The search of the defendant's automobile violated the rights guaranteed to the defendant under Article I, Sections Three, Seven and Twelve of the Constitution of the State of Nebraska and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, the defendant prays the Court suppress and exclude from use against him any and all evidence obtained as a result of the search of the defendant's automobile, return to the defendant all items seized pursuant to said search and grant the defendant a hearing on the veracity of the supporting affidavits.

OSWALD P. GONZALEZ

by: /s/ Daniel K. Powers
One of his attorneys

733 Keeline Building
Omaha, NE 68102

Eduardo M. Guzman
One of his attorneys

3660 Wilshire Blvd.
Suite 844
Los Angeles, California 90010

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

DOC. 108 NO. 336

THE STATE OF NEBRASKA,

Plaintiff,

vs.

OSWALD P. GONZALEZ,

Defendant.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

(Filed November 20, 1980)

COMES NOW the defendant, Oswald P. Gonzalez, and moves the Court to suppress and exclude from use in evidence any item seized or derived from a search of 3524 Jackson for the reasons stated in defendant's motion to suppress the items seized as a result of the search of the defendant's automobile which are hereby adopted and incorporated by reference.

WHEREFORE, the defendant prays that the Court suppress and exclude all evidence obtained and derived from a search of 3524 Jackson, Omaha, Nebraska.

OSWALD P. GONZALEZ

By /s/ DANIEL K. POWERS
One of his Attorneys

733 Keeline Building
Omaha, Nebraska 68102

EDUARDO M. GUZMAN
One of his Attorneys

3660 Wilshire Boulevard
Suite 844
Los Angeles, California 90010

APPENDIX D

CRIMINAL DOCKET
DISTRICT COURT, DOUGLAS COUNTY

App. Doc. 108 Page 336

THE STATE OF NEBRASKA

vs.

OSWALD P. GONZALEZ

UNLAWFUL DISTRIBUTION OF CONTROLLED SUBSTANCE 21962

Assigned to Judge Hickman

3-31-81—Hearing was held on defendant's 4 separate motions to suppress evidence on November 26, 1980 and the respective motions were taken under advisement by the Court pending receipt of briefs from counsel. The Court having now fully considered the evidence, law, briefs and arguments of counsel finds that each of the defendant's motions should be and the same hereby are each overruled. Paul J. Hickman.

OFFICE OF CLERK OF THE SUPREME COURT

Lincoln, NE 68509 July 21, 1982

In case of

STATE V. GONZALEZ, NO. 44356 (108-336)

The following orders have been made:

MOTION OF APPELLANT FOR REHEARING OVERRULED

Respectfully, LARRY D. DONELSON, Clerk.